Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

PHILIP L. PROCTOR

Petitioner,

V.

UNITED STATES
and
UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the
Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introductory Statement: Petitioner seeks to have this court set constitutional and due process parameters in government seizure cases and student loan matters in particular. Petitioner seeks to prevent abuses of the government and to ensure that the loan is actually owed. In this matter, Petitioner Proctor had repaid his student loans by 1995, however Respondent United States mishandled their records due to a confusion of records with another borrower, Scott Wiermaa. The government has refused to provide payment histories and has engaged in other conduct that effectively denied Petitioner Proctor his due process and other constitutionally protected rights.

Question for Review No 1: Whether Petitioner Proctor was denied procedural and substantive due process and his First Amendment right to petition the government to redress grievances due to denial of payment histories, unreasonable delay, and special hardship. The special hardship included that Respondent United States refused disclosure of payment histories (even though required to produce them), there was a mistaken identity with another individual who had a nearly identical social security number, the government changed its records to conceal the connection to this other individual, and there were partial payment histories found and other evidence that showed payments were made.

Question for Review No 2: Whether the due process and to petition the government to redress grievances due to unreasonable delay and special hardship would be grounds to preclude Respondent United States from pursuing punitive interest, if not the obligation itself.

PARTIES TO THE PROCEEDING

Petitioner, Philip L. Proctor, was the Plaintiff in the District Court and the Appellant in the Court of Appeals.

Respondents, United States and United States Department of Education, were the Defendants in the District Court and the Appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Philip L. Proctor (henceforth Petitioner Proctor) respectfully requests that this court issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, *Proctor* v. *United States Department of Education*, (Unpublished), Case No. 05-3558, entered August 21, 2006.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, *Proctor* v. *United States Department of Education*, (Unpublished), Case No. 05-3558, entered on August 21, 2006, is reproduced in the Appendix to this Petition at page A-1.

The Order regarding Rehearing of the United States Court of Appeals for the Sixth Circuit, *Proctor* v. *United States Department of Education*, (Unpublished), Case No. 05-3558, entered on December 5, 2006, is reproduced in the Appendix to this Petition at page A-10.

The Opinion of the United States District Court for the Southern District of Ohio, *Proctor* v. *United States Department of Education*, (Unpublished), Case No. 02-00254, entered on March 24, 2005, is reproduced in the Appendix to this Petition at page A-11.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit rendered its Opinion on August 21, 2006 (Apx, pg A-1). The Order upon Petition for Rehearing was filed on December 5, 2006 (Apx, pg A-10). This Opinion and Order Affirmed the ruling of the lower court. The United States District Court for the Southern District of Ohio rendered its Opinion on March 24, 2005 (Apx, pg A-11). The District Court matter was partially an appeal of an administrative decision from the United States Department of Education. Petitioner now timely files Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

This Court's jurisdiction is invoked pursuant to 28

U.S.C. § 1254 as a case reviewable after rendition of judgment from the Court of Appeals. In addition, the lower court's jurisdiction for judicial review of agency decisions can be found at 5 U.S.C. § 702, 5 U.S.C. § 704, and 5 U.S.C. § 706. Further, the lower court's jurisdiction to review matters where the United States is a Defendant can be found at 28 U.S.C. § 1346.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitutional provisions cited herein were the due process clause derived from the Fifth and Fourteenth Amendments (Appendix, pg. A-43); and the First Amendment right to petition the government to redress grievances (Appendix, pg. A-43).

Relevant statutes cited herein were 5 U.S.C. § 552a requiring the government to maintain and produce records (Appendix, pg. A-44); 20 U.S.C. § 1095a the enabling statute for an administrative wage garnishment (Appendix, pg. A-45); 20 U.S.C. § 1091a regarding statute of limitations (Appendix, pg. A-46); 28 U.S.C. § 1080 the due diligence statute requiring regulatory procedures to be followed (Appendix, pg. A-46); and 5 U.S.C. § 706 which requires the reviewing court to compel agency action unlawfully withheld (Appendix, pg. A-47).

Relevant regulations cited herein were CFR 682.409(c) (Appendix, pg. A-48); CFR 682.410 (Appendix, pg. A-50); and CFR 682.414(a) (Appendix, pg. A-48) which requires that the government keep, and provide, upon request, payment histories.

STATEMENT OF THE CASE

In this case, Petitioner Proctor seeks Certiorari regarding a judgment from the Sixth Circuit wherein said court upheld

summary judgment on behalf of Respondent United States and United States Department of Education (henceforth Respondent United States, Department of Education, or government) and ordered Petitioner Proctor to repay student loans, plus substantial interest, even though the loans had been previously paid in full.

I. Lower Court History

In July, 2001, the Department of Education began an administrative wage garnishment against Proctor to pay for student loans. On February 19, 2002 an administrative appeal decision upheld the actions of the Department of Education. The matter was appealed to the District Court. On March 24, 2005, the District Court rendered judgment on behalf of Respondent United States in the amount of $84,359.22. Said ruling of the District Court was affirmed by the Sixth Circuit on August 21, 2006 with the Petition for Rehearing being denied by the Sixth Circuit on December 5, 2006.

II. Background Facts

Petitioner Proctor attended the University of Iowa and Thomas Cooley Law School from 1978 through 1988. He obtained sixteen student loans for his studies, the last loan being made in December, 1987. The Department of Education claimed that eleven of these loans had never been paid but does not dispute that the remaining loans have were paid in full.

The total amount borrowed of the eleven loans in question was $32,646.00, and the remaining amount that Proctor borrowed which is not in question amounted to $6,340.00. While the amount borrowed on the eleven loans in question was $32,646.00, the balance of the $84,359.22 judgment was for interest. The eleven loans in question were

held by the Higher Education Assistance Foundation (henceforth HEAF), the Iowa College Student Aid Commission (henceforth ICSAC), and the Michigan Higher Education Assistance Authority, Office of Michigan Guaranty Agency (henceforth MHEAA). The remaining loans that the Department of Education does not dispute were paid in full were held by the University of Iowa and HEAF.

Petitioner Proctor began making paying on his loans in 1990. He paid off his remaining balances in 1995 from a lump sum amount received from one of his clients. It was undisputed and verified by supporting documents that Petitioner Proctor's own bank records of payments were lost in a theft in 1995. After Petitioner Proctor learned of the action taken against him by the Department of Education, he attempted to retrieve his records from his banks. However, he could not do so because, due the extended passage of time, his payment records had been purged by the banks.

The HEAF loans were transferred to the Department of Education in 1993, not because Proctor failed to pay the loans, but rather because HEAF was then financially insolvent and being dissolved . However, the loans continued to be serviced by the servicing agency called the Student Loan Marketing Association (henceforth Sallie Mae).

During this time period, a confusion of records came about with another student borrower, Scott Wiermaa, who had the exact same social security number except that the first three digits for Mr. Wiermaa were 474 whereas for Proctor they were 479. Both individuals attended college at about the same time, both had student loans, and both were serviced by the servicing agency Sallie Mae. Scott Wiermaa however declared a Chapter 13 bankruptcy and had completed payments under his plan by 1991. Also, during this time period, the agencies that held the

loans in question (HEAF, ICSAC, MHEAA), who rely almost completely on social security numbers to keep pay records, had continually failed to correct a problem with recording Proctor's social security number correctly.

In 1997/1998, the Department of Education, having possession of the HEAF loans and apparently being confused by the documentation in their file, decided to call in Proctor's other student loans held by ICSAC, MHEAA that had also been serviced by Sallie Mae.

Even though Scott Wiermaa had completed his Chapter 13 bankruptcy in 1991, there were insurance reimbursements noted on his accounts at the same time that the Department of Education took each of Proctor's loans in 1993 and 1997/1998. However, during the course of the litigation, the government actually changed these records to remove these notations apparently to cover up the connection to Scott Wiermaa.

Petitioner Proctor has been employed as an attorney since his admission to the bar in 1990, and he informed the government of every address that he had after his law school graduation until he completed payments. It was undisputed that the government has always had Proctor's current address and that Proctor has continually complied with his attorney registration requirement to keep the Ohio Supreme Court, Office of Attorney Registration informed of his current address since he has been an attorney.

Even though the government has always had location information on Proctor, no action was pursued against him until 2001. It should be noted, however, that none of the guaranty agencies nor the Department of Education itself ever actually pursued any action against Proctor. In 2000, the Department of Education discovered that Proctor's loans were mistakenly sent

to a collection agency. The Department of Education then pulled them from the collection agency and canceled an attempted wage garnishment.

Instead of correcting this error, however, in 2001, Proctor's loans were again sent to a different collection agency. This collection agency merely verified where Proctor was employed and sent notice to his employer in July, 2001 to begin the wage garnishment. The Department of Education again pulled the case from the collection agency, but has not ceased the withholding.

III. Refusal to Provide Payment Histories

Upon receiving discovery in this matter, Proctor first learned that there were documents in his file from Scott Wiermaa who had the nearly identical social security number. Proctor therefore sought discovery of the payment histories that were kept by the government at or near the time that he made his payments in the early 1990s and persons in the chain of custody of these documents or who would otherwise have personal knowledge of Proctor's case. The government however refused to provide any of this important information. Therefore, Proctor filed a motion to compel discovery.

In the District Court's Judgment Entry filed on June 23, 2003, the District Court stated that the Department of Education had provided Proctor with the names and addresses of every entity that held his loans and that it was up to Proctor to contact these agencies and obtain the requested information. However, the guaranty agencies also refused to produce the payment histories and other discovery.

The Department of Education never produced any payment histories and the only full payment histories that

Proctor was able to find were those for his University of Iowa loans. The University of Iowa payment histories showed full payments in the early 1990s consistent with Proctor's testimony. However, Proctor did find fragments of a payment histories on his HEAF and MHEAA loans and documents that indicated that at least $3,000.00 was paid to HEAF.

The Department of Educatio.. took two different postures regarding Proctor's request to produce payment histories. First, they stated that the payment histories had been accidentally destroyed. However, when that position did not seem to favor their case, they claimed that the payment histories were in the possession of the guaranty agencies, but that they would not produce them.

Moreover, at first, the government stated in their interrogatory response that the payment histories on electronic tapes, ". . .were not retained. . ." Regarding the hard copies of payment histories, the government stated that these documents were kept in stored boxes and were labeled, "GSL Correspondence." The government then provided the following explanation as to what happened with these documents:

> "Normally, these boxes are kept with no destruction date. However, in 1999, an Education official mistakenly directed Student Loan Processing Center personnel to destroy these boxes. Destruction of these boxes continued until some point in 2001, when it was discovered and the destruction of these boxes was discontinued."

The fact that the payment histories may have been lost was also stated in deposition testimony of a Department of Education employee. However, in affidavits submitted to the court, it was later claimed that the guaranty agencies actually

had possession of the payment histories.

As logic would dictate, Proctor then requested that there be a joinder of the guaranty agencies so that the court could compel them to produce the payment histories that they claimed were within their possession. However, the District Court denied a joinder of the guaranty agencies.

Thus, Proctor was left in an impossible position. He could not prove his case without the original payment histories from the 1990 to 1995 time period in which he made his payments, and the District Court would not compel discovery from the Department of Education or allow a joinder of the guaranty agencies so discovery could be compelled of them. On the other hand, the government said that they had payment histories, but they simply refused to produce them.

IV. Evidence Found that Payments were Made

In spite of this dilemma however, Proctor was able to find a considerable amount of evidence that supported his position. First, Proctor was able to find portions of the payment histories from his HEAF and MHEAA loans. These documents, although incomplete, demonstrated not only that the payment histories existed, but also that payments were made without credit being given to Proctor.

Second, Proctor discovered a document from a servicing agency called Great Lakes which indicated that payments were made on the HEAF loans in question which showed that at least $3,000.00 was paid to HEAF. Again Proctor received no credit for payments to HEAF in spite of this documentation.

Third, Proctor provided a complete payment history for his University of Iowa NDSL loans. The payments on these

loans were consistent with Proctor's testimony that he paid his loans during the 1990 to 1995 time period. It also showed that payment histories existed, payments and the nonexistence of payments were recorded, and that these records were required to be kept. Further, it showed that Proctor must have paid his other loans as well because it would be illogical that Proctor would pick out one set of loans and exclude all others.

Fourth, there were notations on a data collection service for the government called the National Student Loan Data System (henceforth NSLDS) that stated that payments were made. Thus, the NSLDS sub-reports stated that Proctor made at least six consecutive payments on each of the eleven loans in question. However, this report also stated that the reporting - and not the payments - stopped for reasons unknown. Oddly enough, however, the NSLDS sub-reports did not state how much was paid or when.

Fifth, there was witness testimony presented. Proctor's client, Jennifer Taylor, testified that she paid Proctor $10,000.00 in 1995 which Proctor used to pay the remaining balances on his loans. Julie Peterman was the person who took Proctor's lock box in the 1995 theft, and she testified that the box contained student loan receipts and documents. And, Philip Proctor himself testified that the payments were made.

Finally, and perhaps most significantly, Proctor discovered a connection with the Scott Wiermaa account who had the nearly identical social security number as will be discussed next.

V. Government Destroys Evidence to Conceal Connection to Scott Wiermaa Account

On the one hand, hard copies of Scott Wiermaa's documents were found in Proctor's file even though Scott Wiermaa's case had been closed ten years earlier. However, there were significant accounting notations on Scott Wiermaa's NSLDS report account which corresponded perfectly with activity in Proctor's case even though Scott Wiermaa's account was supposed to be closed years earlier. More specifically, even though Scott Wiermaa's bankruptcy was completed in 1991, there were insurance reimbursements noted on Scott Wiermaa's NSLDS reports in 1993 and 1997/1998.

When insurance reimbursement is obtained from the Department of Education for lack of payment or bankruptcy, those are noted on the NSLDS reports. However, at the exact times that insurance reimbursement was obtained by the guaranty agencies for Proctor's supposed failure to pay his loans, the reimbursement notations were made on Scott Wiermaa's account and not Proctor's.

During the course of the litigation, the Department of Education, apparently being unaware that Proctor already had these documents, actually went back and changed the NSLDS reports to cover up the connection to Scott Wiermaa.

VI. Refusal to Identify Known Witnesses

Instead of using the payment histories, the government relied on a document called a statement of purchased account. The Department of Education argued that all payments on the payment histories were transcribed or transmitted onto the statement of purchased account at the time the loans were taken by the Department of Education. However, it was unclear when

these documents were actually created, some being dated after the litigation began, which indicated that the documents may have actually been created by Education during the litigation.

Naturally, to answer the questions about the reliability and trustworthiness of the statements of purchased accounts, Proctor requested the names and addresses of the person who did the transmittals. Even though this information would be easy to produce since the supposed transmittals happened on one particular day for each of the guaranty agencies, the government again refused to provide this information. And, again, the court would not compel the discovery.

VII. "The Bankruptcy Records Retention Error" Theory

Both the District Court and the Court of Appeals insisted that Proctor set forth exactly what error occurred and how that happened. However, without the payment histories and access to the records, it was impossible for Proctor to know exactly what happened. Nevertheless, Proctor's theory was what he will call here, "the bankruptcy records retention error."

In other words, it was not that Proctor's account was confused personally with Scott Wiermaa's account, but rather that Proctor's account was confused with a bankruptcy account. This type of confusion can lead to the guaranty agency discarding the payment histories since they would believe that the payments have been recorded in the bankruptcy case or that the loans were discharged in bankruptcy (discharge was allowed then regardless of the income of the borrower).

"The bankruptcy records retention error" is not a common error, but this can and has happened before. However, whether this error actually occurred or not in this particular case would easily be cleared up by a review of the original payment

histories.

VIII. Relevant Discovery Denied and Summary Judgment Granted

In spite of the evidence produced by Proctor in support of his position, and in spite of the fact that the government refused to provide the payment histories or identify the persons who transmitted the statements of purchased accounts, the District Court nevertheless denied Proctor a trial. Instead, the District Court granted summary judgment on behalf of the government in the amount of $84,359.22.

REASON FOR GRANTING THE WRIT

I. Proctor was Denied both Procedural and Substantive Due Process

This writ presents an issue critical to protecting constitutional due process so that the citizens of the United States can be protected from the abuses of the federal government regarding governmental seizures and abuses related to collection of student loans in particular. Thus, in this case there can be no question that Petitioner Proctor was completely denied all due process necessary to defend the accusation against him. Moreover, the Department of Education has not only flat out denied Proctor basic discovery of essential documents, but has also actively concealed and altered documents in an attempt to cover up evidence that supported Proctor's position.

Thus, Proctor was denied both procedural and substantive due process. The District Court and Court of Appeals found that Proctor carried the burden of proof and said that he could not prove that he paid his loans. However, before

there can be any analysis of whether Proctor did or did not pay his loans, he must be provided the necessary discovery to make his own independent investigation. This is a basic component of procedural due process.

The lower courts also failed to examine whether Proctor was denied substantive due process. Moreover, Proctor had a legitimate liberty and property interest protected under the Fifth and Fourteen Amendments, and those constitutional interests were denied him due to undue delay and special hardship.

II. Proctor was Denied his First Amendment Right to Petition the Government to Redress Grievances

The abuses of the government cut so deep that they actually go beyond a mere denial of due process and further amount to a denial of his First Amendment right to petition the government to redress grievances. This is a right that the Supreme Court has described as ". . .among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America v. Illinois State Bar Assoc.*, (1967), 389 US 217, 19 L Ed 2d 426, pg. 430. Moreover, this is a right of substance not form.

In this case, Proctor has no means to obtain the payment histories and other essential evidence without the assistance of the court. However, the trial court denied Proctor's request to compel the government to produce the discovery claiming that the evidence was in the possession of the guaranty agencies who were not made a party to the action. At the same time, the trial court denied a request to join the guaranty agencies as a necessary party. The denial of production of payment histories, denial of naming witnesses, and the changing of records by the government clearly were abuses that go to the heart of due process and the ability to petition.

III. Split in the Circuits

The ruling of the Sixth Circuit has also created a split in the circuits and departed from previous rulings of the Supreme Court that have found that where there is undue delay and "special hardships" there is a denial of due process. The "special hardships" definition of due process was recognized by the Supreme Court in *Chase Securities Corp. v. Donaldson*, (1945), 325 U.S. 304, 315-316. This rule has been adopted at least by the First and Eighth Circuits and has even been implied within the Sixth Circuit. Nevertheless, the Sixth Circuit refused to consider "special hardship" as it applies to due process, thus leaving a mess of confusion in the Circuits.

ARGUMENT

The right to due process under the Fifth and Fourteenth Amendments guarantees both procedural and substantive due process. Even though Congress intended to remove the time limitation for the government to enforce student loans when it amended 20 U.S.C. § 1091a to eliminate the previous six year statute of limitations, Congressional intent cannot be construed to have also eliminated due process. Nor can it be said that the First Amendment right to petition has been removed.

Therefore, Proctor is entitled to full process as would be allowed in any other civil case, and that includes production of payment histories and discovery. Furthermore, if the government has lost or destroyed these records, then that would amount to a denial of Proctor's substantive constitutional rights. Moreover, Proctor has a legitimate and critically important right to review all necessary records, especially since the government is required to keep and produce the payment histories.

I. Proctor was Denied Procedural Due Process Because Production of Payment Histories and Discovery is Required by Statute, Regulation, Contract, and Case Law

Production of payment histories and other discovery is a basic discovery right, and the denial of the basic discovery in this case amounts to a denial of procedural due process. The fact that the government must produce the payment histories and provide other necessary discovery is supported by statute, regulation, contract, and case law.

5 U.S.C. § 552a requires the government to: 1. maintain payment histories, 2. produce the payment histories to Proctor upon his request, and 3. allows for civil remedies and damages if they fail to do so. The government's failure to comply with this statute is grounds for the recovery of damages regardless of whether the loss of or refusal to produce the payment histories was intentional or inadvertent. This statute therefore would be a precondition to enforcement of the loans and must be examined before the court could review whether or not other documents could be used as evidence in substitute of the payment histories.

Moreover, 5 U.S.C. § 552a contains the following provisions:

> § 552a. Records maintained on individuals
>
> (a) Definitions. – For purposes of this section –
>
> (4)The term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education. . . and that contains his name, or identifying number, symbol, or other identifying

particular assigned to the individual. . ."

(d) Access to records. -- Each agency that maintains a system of records SHALL –

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, PERMIT HIM. . . TO REVIEW THE RECORD AND HAVE A COPY MADE of all or any portion thereof in a form comprehensible to him. . .

(e) Agency Requirements. -- Each agency that maintains a system of records SHALL –

(5) maintain all records which are used by the agency in making any determination about any individual with such ACCURACY, relevance, timeliness, and COMPLETENESS as is reasonably necessary to assure fairness to the individual in the determination. . ."

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained. . ."

(g)(1) Civil remedies. – Whenever any agency

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such ACCURACY, relevance, timeliness, and COMPLETENESS as is necessary to assure fairness in any determination relating to the

qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(3)(A) In any civil suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case THE COURT SHALL DETERMINE THE MATTER DE NOVO,. . . AND THE BURDEN IS ON THE AGENCY TO SUSTAIN ITS ACTION.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

After reviewing the provisions set forth in 5 U.S.C. § 552a there can be no question that the Department of Education has violated this statute. Thus, before the trial court can examine the issue of whether Proctor paid his loans and whether other documents can be substituted, the court must make the appropriate review under 5 U.S.C. § 552a. Furthermore, that review must be *de novo* and the burden is on the government to comply with the statute.

In addition, 20 U.S.C. 1095a, the enabling statute for an administrative wage garnishment, requires the government to produce payment histories and other discovery as a precondition to pursuing a wage garnishment.

Moreover, 20 U.S.C. § 1095a(3) states as follows:

> "[The Secretary] may garnish the disposable pay of an individual to collect the amount owed by the individual. . . PROVIDED THAT. . . the individual SHALL be provided the opportunity to inspect and copy records relating to the debt. . ."

In addition, other statutes, regulations, and court rules support Proctor's position that payment histories must be kept and produced. Thus, 28 U.S.C. § 1080 is a due diligence statute requiring regulatory procedures to be followed (see Appendix, pg. A-46). CFR 682.409(c), CFR 682.410, and CFR 682.414(a) requires that the government keep, and provide upon request, payment histories (see Appendix, pg. A-48 to A-50). In addition, FRCP 37 allows for sanctions for a refusal to produce necessary discovery, and 5 U.S.C. § 706(1) requires the reviewing court to compel agency action unlawfully withheld (see Appendix, pg. A-47).

Even though it is abundantly clear that the government cannot refuse to produce the payment histories and other necessary evidence, the Department of Education nevertheless stated that they were not required to do so since they provided a substitute in the form of the statements of purchased accounts. However, regardless of whether this transmittal was or was not accurate or trustworthy, Proctor still had the right to review the original payment histories so he could make his own determination of the reliability of the record evidence.

In *U.S. v. Rhodes*, (D. Mich. 1992), 788 F. Supp. 339, the court said that there cannot be any substitution for the payment histories and that producing the original payment histories was a precondition to enforcement. This was especially true since the contractual terms of the promissory notes required production of payment histories. Moreover, the notes state that the government must comply with statutory and regulatory provisions as a precondition to enforcement.

Rhodes was a case nearly identical to the *Proctor* matter which involved a situation where the payment histories had been lost and the Department of Education argued that the statement of purchased accounts should be substituted. Even though *Rhodes* was a case within the Sixth Circuit, the Court of Appeals nevertheless chose to ignore it stating that it was not binding upon the Court. Oddly enough however, the Court of Appeals cited *U.S. v. Dwelley*, (D. Me. 1999), 59 F. Supp. 2d 115 in its decision. However, *Dwelley*, pg 119, cited *Rhodes* and agreed with *Rhodes* that a defense is possible in circumstances such as lost payment histories. In conclusion, Proctor was unquestionably denied procedural due process since the production of the payment histories and other discovery is so clearly mandated.

II. Proctor was Denied Substantive Due Process Because there was Undue Delay and Special Hardship

Since it would appear that the original payment history have actually been lost or discarded, Proctor has also been denied substantive due process. This can seen from a review of the totality of the circumstances. Thus, the government's refusal to produce payment histories, their changing of the record to conceal the connection to Scott Wiermaa, and other

actions to manipulate the record in their favor amounted to a denial of substantive due process. These actions have denied Proctor his liberty and property interests protected under the Fifth and Fourteenth Amendments because they have precluded Proctor's ability to put on his case. In examining substantive due process in regard to matters such as this the courts have looked at unreasonable delay and "special hardship," with the latter being the key to the analysis.

The government's outright refusal to provide crucial payment histories is exasperated in this case by their unreasonable delay. Proctor is an attorney who is licensed in Ohio. He has always provided his address to the government and his address has otherwise always been listed with the Ohio Supreme Court attorney registration office. 28 U.S.C. § 1080, CFR 682.409(c), CFR 682.410, and CFR 682.414(a) not only required the government to keep and produce payment histories, but also requires the government to pursue either court action or wage garnishment within a year so long as location on the borrower is known (see Appendix, pg. A-46 and A-48 to A-50). This is called a "due diligence" requirement and is meant to ensure that unreasonable delays do not cause or contribute to necessary evidence being lost.

When Congress passed the current version of 20 U.S.C. § 1091a, which eliminated the previous six year statute of limitations, they did so with the intent that the government would follow the CFR regulations that required them to pursue action timely and produce payment histories upon request. This Congressional intent can be seen from a reading of the Congressional Record.

Moreover, the Congressional Record, March 19, 1991, pg 6459, states:

> "In my view, the development and consideration of H. R. 1285 has been a model of collaboration and cooperation between. . . the committee and the Department of Education. . . . By agreement, the leadership of the Education and Labor Committee has limited provisions in this bill to technical amendments or provisions clarifying congressional intent on legislation for which the Department of Education is drafting regulations."

Moreover, if the government had followed their due diligence requirement and pursued action sooner, Proctor would have been able to retrieve his own records. This is all the more reason that Proctor was left to rely on the government to produce the payment histories that they were required to keep.

In addition, the U.S. Supreme Court and the circuit courts have found that where a "special hardship" exists, there can be a denial of due process. Due process is not the same as due diligence and laches which was the focus of the Court of Appeals in their decision. Thus, the "special hardship" necessary for due process goes beyond the scope of a due diligence and laches because it addresses whether the abuses of the government denied the person subject to these abuses the opportunity to put on his case.

In *U.S. v. McLaughlin*, (D. Mass. 1998), 7 F. Supp. 2nd 90, (a case cited by the district court), the court said that the U.S. Supreme Court has suggested that Fifth Amendment due process concerns would be implicated upon a showing of "special hardship." *McLaughlin* cited *Chase Securities Corp.*

v. Donaldson, (1945), 325 U.S. 304, 315-316, which said that due process is denied upon showing of "special hardships and oppressive effects." The court, in *McLaughlin*, also cited *Rhodes* as an example of "special hardship" because, in *Rhodes*, the government lost their own payment histories.

McLaughlin also stated that the First Circuit has recognized "hardship." For example, in *Precious Metals Assoc. v. Commodity Futures Trading Com.*, (1st Cir. 1980), 620 F. 2d 900, 909, the court recognized "hardship" where the agency had discarded relevant papers. *Precious Metals* cited the Eight Circuit case of *EEOC v. Liberty Loan Corp.*, (8th Cir. 1978), 584 F. 2d 853. In *EEOC*, 856, the court said that the reviewing court must comply with 5 U.S.C. § 706 which:

> ". . .applies to situations where a federal agency refuses to act in disregard of its legal duty to act. . .[and] the reviewing court shall - compel agency action unlawfully withheld or unreasonably delayed."

Thus, *EEOC* concluded, and *Precious Metals* agreed, that lost or discarded records and papers amount to "special hardship."

Moreover, "special hardship" is the key to denial of substantive due process. The totality of the circumstances and abuses by the government add up to a denial of due process. Thus, if all the circumstances together are examined, it becomes abundantly clear that "special hardship" existed. For example, the government continually had difficulty recording Proctor's social security number correctly, Scott Wiermaa's documents were found in Proctor's file, HEAF was dissolved because it had difficulty keeping records correctly, there were insurance reimbursements noted on Scott Wiermaa's accounts at the same time that the Department of Education took each of

Proctor's loans, during the course of the litigation, the Department of Education changed these records to cover up the connection to Scott Wiermaa, the government has always had a current location on Proctor since he is licensed as an attorney in Ohio but has never previously made any attempt to pursue action, the government should have copies of the payment histories in no less than eight locations but refused to provide them, the government refused to produce the names of witnesses who allegedly transmitted the payment histories, portions of the payment histories from the HEAF and MHEAA loans were found showing payment, the Great Lakes document showed payment, the University of Iowa payment history showed payment, the NSLDS sub-reports showed payment, witness testimony demonstrated payment, and there was evidence that the government actually lost the records.

While "special hardship" is gleaned from a totality of the circumstances, the refusal to provide payment histories does, in itself, amount to a denial of due process. This is a logical defense because the government has a clearly defined duty to keep and provide payment histories. Thus, the refusal to provide payment histories and other abusive actions, prevented Proctor's opportunity to present his case.

However, the *Proctor* case now leaves a split in the circuits and a mess of confusion on the law. The Court of Appeals went to great lengths to discuss why statutory and legal defenses such as laches and due diligence should not be accepted in this context. Although it is arguable whether the Court of Appeals' analysis was correct, what they overlooked was that Proctor presented these matters mainly to develop the history for the presentation of special hardship as it applies to due process. In other words, special hardship is not exactly the same as the neglect of timeliness required by statutory and

regulatory due diligence and different from undue delay and material prejudice described by laches. Moreover, when the government's actions (such as denial of payment histories and manipulation of the records to their advantage) go to the party's fundamental opportunity to put forward his case, he has been denied his constitutional right to due process.

Applying due process to this case would not harm the United States whatsoever because it is not a complete defense. Rather, it only applies so long as the "special hardship" exists. Thus, the Department of Education could extinguish the "special hardship" by simply providing the payment histories and other necessary discovery. Thus, if the payment histories have actually been lost, which appears to be likely, then the case would be dismissed without prejudice until such time as the government finds these records. Since Congress eliminated the statute of limitations in 20 U.S.C. § 1091a, the Department of Education would be free to re-file at any time. Because the Department of Education was not prepared to file and did not have a desire to file in the first place, this would seem a logical and reasonable answer.

III. First Amendment Right to Petition the Government to Redress Grievances

An even more fundamental constitutional right than due process, is the First Amendment right to petition the government to redress grievances. In *United Mine Workers of America v. Illinois State Bar Assoc.*, (1967), 389 US 217, 19 L Ed 2d 426, pg. 430, the Supreme Court described the right to petition as follows:

> ". . . [The right] to petition for redress of grievances [is] among the most precious of the liberties

> safeguarded by the Bill of Rights. [This right, moreover, is] intimately connected, both in origin and in purpose with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.' The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees. . . ."

Edwards v. South Carolina, (1963), 372 US 229, 9 L Ed 2d 697, pg. 703-704, described the right to petition as:

> ". . .an opportunity essential to the security of the Republic, [and it] is a fundamental principle of our constitutional system."

Furthermore, in *LeBlanc-Sternberg v. Fletcher*, (1991), 781 F Supp 261, pg. 265, the court said that:

> "The right to petition is fundamental to the very idea of a republican form of government."

The First Amendment right to petition the government to redress grievances means more than just giving the people access to government buildings and courthouses. It must be a right of substance and not form. Moreover, in *Graham v. Henderson*, (1996), 89 F Supp 75, pg. 80, the court said:

> "Because of its central importance, the right is 'substantive rather than procedural, regardless of the procedural means applied.'"

In *California Motor Transport Co. v. Trucking Unlimited*, (1972), 404 US 508, 30 L Ed 2d 642, pg. 646, the Supreme Court said that the right to petition applies to

administrative agencies and the courts alike. The court said that mere access to petition and to the courts is not a complete fulfillment of the right to petition as access is but one aspect of the right. Furthermore, the court said that since the right to petition is a right protected under the Bill of Rights, the Supreme Court cannot impute a Congressional or administrative intent in any statute or regulation to invade this freedom.

The denial of production of original payment histories and other discovery denied Proctor the ability to put forward his case. This was a matter of substance which denied Proctor's First Amendment right to petition. In fact, both the trial court and the Court of Appeals essentially said that unless a borrower has kept his own payment records, there is no defense. If the court's are not going to compel the government to produce the necessary documents and other evidence which the government claims to possess, there is no substance to the court process.

To uphold the Appeals Court decision would leave anyone who has ever had a student loan and not kept their own records vulnerable to the abuses of the government. In Proctor's case, the loans were twenty to thirty years old and his payments began about seventeen years ago. It would not be uncommon for other persons similarly situated not to have kept their own records after such an long expanse of time. Furthermore, there is no legal duty for the borrower to keep his own records at all, whereas there is a clearly defined legal duty by statute, regulation, and contract upon the government to do so.

IV. Due Process and the Right to Petition should be Applied to the Punitive Interest if not the Obligation Itself

Proctor also contends that to the extent that this court would not apply due process and the First Amendment right to petition the government to redress grievances to the obligation itself, the Supreme Court should do so at least as to the punitive interest that is being assessed against Proctor.

The issue of the punitive interest was an important aspect of this matter; but yet it did not receive any attention from the Court of Appeals. The apparent reason the amount more than doubled from the $40,099.97 that the Department of Education said they paid for the loans (the original amount borrowed was $32,646.00) to the $84,359.22 judgment was because the Department of Education capitalized the interest. The district court once again capitalized the interest (even though there is no authority to do so) with the judgment. This leaves Proctor paying interest, on interest, on interest.[1]

The previously argued statutes, regulations, and court rules (which provide for sanction for not providing payment histories and other evidence) at the very least should mean that the government would be precluded from the recovery of punitive interest. Furthermore, punitive interest charges should, at the least, be subject to the due process "special hardship" defense.

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[1]When Congress eliminated the statute of limitations in 20 U.S.C. § 1091a they only referred to the "obligation" itself and reasonable collection costs (collection costs were waived in this case). This would arguably mean that punitive interest would remain subject to the general six year statute of limitation under 28 U.S.C. § 2415(a).

It is unfortunate enough that Proctor should have to repay his loans because the government lost the payment histories; he should not also be punished. To allow the government to collect punitive interest would allow them to profit from their own mistakes, and it would lump Proctor into the same category as borrowers who evade payment in the face of a complete record of nonpayment.

CONCLUSION

For the reasons set forth herein, Proctor requests that this court grant his Writ of Certiorari and that the decision of the court below be reversed or that this matter be remanded with instructions. **Petitioner Proctor also requests a stay pending further review or remand.**

Respectfully Submitted,

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